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No. 85-1621 (2)

In The

Supreme Court of the United States

October Term, 1985

HON YIP known as YIP HON,

Petitioner,

v.

CLINTON L. PAGANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT CLINTON L. PAGANO

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QUESTIONS PRESENTED

Did the Court of Appeals for the Third Circuit properly affirm the District Court's holding that respondent was absolutely privileged to issue defamatory statements if the statements were made before a congressional subcommittee and if the statements were relevant to the legitimate legislative business of the subcommittee?

A. Does state or federal law control the question of whether there is a judicial remedy for injury resulting from allegedly defamatory statements made during a congressional subcommittee hearing?

B. Assuming state law applies, should this Court grant a writ of certiorari to review the decision of the court below holding that New Jersey law granted respondent an absolute privilege to publish the allegedly defamatory matter as part of a congressional subcommittee hearing in which he testified?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT CLINTON L. PAGANO

BRIEF IN OPPOSITION

Respondent, Clinton L. Pagano, respectfully requests that this Court deny the Petition for A Writ of Certiorari seeking to review the decision of the Court of Appeals for the Third Circuit entered in this case on January 16, 1986, petitioner's request for rehearing having been denied on February 5, 1986.

COUNTERSTATEMENT OF THE CASE

On February 10, 1984, Colonel Clinton L. Pagano, Superintendent of New Jersey State Police, testified from a prepared statement at a hearing of the Subcommittee on Crime of the United States House of Representative's Committee on the Judiciary. The Subcommittee was then conducting "a hearing in Atlantic City, New Jersey concerning the alleged use of casinos to launder profits realized by alleged organized crime members and drug traffickers." *Yip v. Pagano*, 606 *F. Supp.* 1566, 1567 (D.C.N.J. 1986).

Colonel Pagano prepared and submitted a statement to the Subcommittee in advance of the hearing in which he wrote:

> Yip Hon, an international narcotics smuggler from Hong Kong, China, deposited $110,000 in cash at the Golden Nugget Casino and $280,000 at Ceasar's Casino.

When delivering his statement orally to the Subcommittee, Colonel Pagano inserted the word "alleged" before the words "international narcotics smuggler." *Ibid.* Yip Hon was only one of twelve individuals specifically named by Colonel Pagano to vividly demonstrate that New Jersey's casinos are being used to launder illicitly acquired money. Although specifically invited to testify by the Subcommittees, Colonel Pagano was not subpoenaed. Moreover, the Subcommittee did not request or even suggest that he testify under oath. Colonel Pagano's testimony was immediately preceded by Attorney General Irwin I. Kimmelman's testimony and was followed by testimony from Thomas R. O'Brien, Director, Division of Gaming En-

forcement for New Jersey. These individuals were welcomed at the hearing by Honorable William J. Hughes, Congressman from New Jersey and Chairman of the Subcommittee as New Jersey's top law enforcement officers who were invited to inform the Subcommittee on "the nature and extent of money laundering in casinos." Neither Kimmelman nor O'Brien were subpoenaed or sworn prior to their testimony. Subsequent to the hearing, at the request of Yip Hon, Colonel Pagano asked that all references to Yip Hon be deleted from his written and oral testimony presented to the Subcommittee. No reasons were specified for that request and no conclusions can be drawn from that action. *Id.* at 1573.

On July 26, 1984 Petitioner, Yip Hon, filed this action in federal district court against Colonel Pagano charging that the February 10th statement, as it related to Yip Hon, was false and defamatory, was made recklessly and carelessly without regard to the truth and that Colonel Pagano had been motivated by malice. Jurisdiction in the United States District Court was based exclusively on diversity. No federal cause of action was asserted.

Colonel Pagano moved for summary judgment pursuant to *Fed. R. Civ. P.* 56(c) which the District Court granted after finding that there were no factual issues in dispute and that Colonel Pagano was entitled to a judgment as a matter of law. *Id.* at 1573. The District Court concluded that the issue of respondent's immunity from liability for defamatory statements was governed by state, not federal, common law. Although the law of immunity of a witness in a legislative proceeding has not been squarely addressed by New Jersey's courts, the District

Court held that New Jersey would adopt § 590A of the *Restatement (Second) of Torts* which provides a witness in a legislative proceeding with the same immunity as that granted to witnesses in judicial proceedings. *Id.* at 1570-71. That section of the *Restatement* provides:

> A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.

Applying that doctrine to the facts in the case before it, the District Court found that Colonel Pagano's absolute privilege would not be pierced even though he had not been subpoenaed, did not testify under oath and was not responding to any specific question. *Id.* at 1571.

Yip Hon appealed the decision of the District Court to the Third Circuit. He asked the court to review the District Court's holding that Colonel Pagano was absolutely privileged to issue defamatory statements before a congressional subcommittee when these statements were made maliciously, recklessly and carelessly, and without regard to the truth. He secondly asked the court to decide whether, assuming the absence of malice, the defense of privilege should apply when the witness had not been subpoenaed and the statements were false. He did not appeal the holding that the issue was governed by state law. Without written opinion, the Third Circuit affirmed the decision of the District Court for the reasons set forth in the District Court opinion. 782 *F.*2d 1033 (3rd Cir. 1986). The request for rehearing in banc was denied on February 5, 1986.

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REASONS WHY THE PETITION SHOULD BE DENIED

THE WRIT SOUGHT HERE SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY HELD THAT STATE LAW CONTROLLED THE ISSUE PRESENTED AND CORRECTLY FOUND THAT UNDER NEW JERSEY LAW RESPONDENT'S TESTIMONY BEFORE THE CONGRESSIONAL SUBCOMMITTEE WAS ABSOLUTELY PRIVILEGED.

Yip Hon asks this Court to grant a writ of certiorari to decide whether an individual should be absolutely immune from liability for damages resulting from defamatory statements made before a congressional subcommittee under the particular circumstances alleged in this matter. Only secondly does Yip Hon ask this Court to decide whether a state or federal rule of decision should have been applied.

Before beginning to resolve a case, a federal court must clearly establish whether state or federal law will supply the rule of decision. In this case, the District Court held that state law controlled the issues before it. Yip Hon did not specifically appeal that holding to the Court of Appeals for the Third Circuit.*

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* Yip Hon presented his arguments to the Third Circuit Court of Appeals as follows:

I. Although his false defamatory statements were made to a Congressional Subcommittee, defendant Pagano is not shielded from civil liability for libel and slander because his defamatory statements were made maliciously, recklessly, carelessly, and without regard to the truth.

II. Additionally, even in the absence of malice, defendant Pagano is not shielded from liability for libel and slan-

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Rather, he argued that an individual who testified before a congressional subcommittee, but was not subpoenaed, was not sworn and who did not meet certain other characteristics should not be afforded absolutely immunity from defamation actions.

Thus, it could be argued that petitioner now has no right to present to this Court the question of whether state or federal law should apply the rule of decision. Nevertheless, respondent will first address this question and will demonstrate conclusively that state law must provide the rule of decision. Once that result is established, it will be readily apparent that the application of state law to this particular set of facts does not require or justify complete review by this Court pursuant to a writ of certiorari.

In his complaint filed with the District Court on July 26, 1984, Yip Hon alleged that Colonel Pagano's statement, as it referred to him was false and defamatory, was not made in response to any specific question addressed to defendant, was not pertinent, material or relevant to the hearing, that defendant knew or could have known with the exercise of reasonable care that the statement was false, that the statement was made recklessly and carelessly without regard to the truth, that defendant was motivated by malice and that defendant refused to retract his statement. Although he pled with specificity the manner in which his reputation had been damaged, Yip Hon

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der because his false statements were made under circumstances lacking the safeguards of supervision and control attendant upon judicial proceeding [Petitioner's brief at i, ii].

actually presented a simple cause of action based on the law of defamation. Jurisdiction was premised exclusively on diversity of citizenship; Yip Hon is a citizen of Hong Kong, China and Colonel Pagano is a citizen of New Jersey.

Yip Hon asserted only state tort law claims and did not allege any injury to any federally created or protected interests. It has been clear since 1938 that in diversity actions, "(e)xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co. v. Tompkins,* 304 *U.S.* 64, 78 (1938). It is equally clear that "a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State" and must apply the law of the State to the matter before it. *Guaranty Trust Co. v. York,* 326 *U.S.* 99, 108 (1945).

The law of defamation is a state-created tort law which imposes liability on those who publish false matters which injure the reputation of another. *Maressa v. New Jersey Monthly,* 89 *N.J.* 176, 445 *A.*2d 376, *cert.* denied 459 *U.S.* 907 (1982). This Court has made it very plain that one's interest in his reputation is merely one of a number of personal interests "which the *State* may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damage actions." *Paul v. Davis,* 424 *U.S.* 693, 712 reh'g denied (1976) (emphasis added). An individual has no constitutionally protected liberty or property interest in his reputation alone. *Ibid.* Nor does an individual have any congressionally protected interest in his reputation alone. Accordingly, in a case such as this one, where only a state-created cause

of action for defamation has been alleged, state law provides the rule of decision to be applied by a state or federal court, whichever forum has been selected by the plaintiff. See *Thompson v. Curtis Publishing Co.*, 193 *F.*2d 953 (3rd Cir. 1952) which held that state law controlled the question of whether an action for defamation survived the death of plaintiff's intestate.

Because the protection of one's interest in his reputation is solely a matter of state law, generally "the existence of a judicial remedy for injury to reputations is entirely a matter of state law." *Maressa v. New Jersey Monthly, supra,* 89 *N.J.* at 190. The State may limit, modify or even remove through the operation of testimonial privilege the state-created remedy for injury resulting from defamation. *Mazzella v. Philadelphia Newspapers, Inc.*, 479 *F. Supp.* 523 (E.D.N.Y. 1979). Federal law may also *limit* the extent of the remedy for such injuries. A state may not grant a remedy for defamation injuries when the publication of the defamatory statement is otherwise protected by the United States Constitution. In *New York Times Co. v. Sullivan,* 376 *U.S.* 254 (1964), this Court found that state law could not impose liability on the news media for statements protected by the freedom of speech and press clause of the First Amendment. That holding was further refined in *Gertz v. Welch,* 418 *U.S.* 323 (1974). See also *McDonald v. Smith,* 472 *U.S.* —, 105 *S.Ct.* 2787 (1985) which defines the scope of the protection provided by the right to petition clause of the First Amendment and *Burke v. Deiner,* 97 *N.J.* 465, 479 *A.*2d 393 (1984) which holds that the First Amendment also limits the liability of public officials for defamation to injuries resulting from certain statements made with actual malice.

Thus, it is clear that the federal courts will *prohibit* a state from providing a remedy for defamation when to do so would encroach on the exercise of activities protected by the First Amendment. However, no federal court can expand the protection against damage to ones' reputation provided by state law and "afford recovery if the right to recover is made unavailable by the State," in the absence of a showing that a federally protected interest has been damaged by the defamatory statement. *Guaranty Trust Co. v. York, supra,* 326 *U.S.* at 108-109. Where state law qualifies or abridges a cause of action, the federal courts must do likewise. *Ragan v. Merchants Transfer & Warehouse Co.,* 337 *U.S.* 530, 533, reh'g denied 338 *U.S.* 839 (1949).

The purpose of diversity jurisdiction is not to provide a litigant with an alternative forum to the state courts so that he might find a remedy for his state-created cause of action which is more to his advantage. Rather, it is to provide a forum where a litigant may be assured of a decision which accurately reflects state law free from local bias. *Guaranty Trust Co. v. York, supra,* 326 *U.S.* at 111. It must be remembered that the theory of diversity cases is that "the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court." *Ragan v. Merchants Transfer Warehouse Co., supra,* 337 *U.S.* at 532. Similarly, it must be carefully noted that "(i)f recovery could not be had in the state court, it should be denied in the federal court." *Ibid.* Even when the highest court in the state has not decided the precise point in question, the federal courts are not free to choose their

own rules of decision. *West v. American Telephone & Telegraph Co.*, 311 *U.S.* 223, 236 (1940). Nor may a federal court decline to decide questions of state law when state law is unsettled and it is difficult to ascertain what the state courts may thereafter determine. *Meredith v. Winter Haven*, 320 *U.S.* 228, 234 (1943). State law must be determined "from all the available data" and must be applied by a federal court. *West v. American Telephone Telegraph Co., supra*, 311 *U.S.* at 237. An alternative rule may not be applied by a federal court, "however superior it may appear from the viewpoint of 'general law.'" *Ibid.*

Yip Hon's stated reasons for seeking the writ ignore the fact that his is a diversity action in which state law must be applied and imply that *in this* instance the federal courts should define the tort liability for Colonel Pagano's testimony before the congressional Subcommittee. He suggests that either this Court should create federal common law limiting the privilege afforded a witness before Congress to a qualified one or should find that, as a matter of federal common law, when an unsubpoenaed, unsworn individual speaks before a congressional body, he is not a "witness" but is simply a petitioner of the government within the meaning of *McDonald v. Smith, supra.*

In his articulate opinion for the District Court, Senior Judge Milton H. Cohen clearly found that state law controls the limits of Yip Hon's remedy for the allegedly defamatory statement of Colonel Pagano. *Yip v. Pagano, supra*, 606 *F. Supp.* at 1570. Yip Hon has presented this Court with no justification for overturning the entire history of the law of defamation in this matter. There is absolutely no basis for a finding by a federal court that, in this instance alone, federal common law creates a rem-

edy for defamation greater than that provided by state law.

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois,* 451 *U.S.* 304, 312 (1981). The federal court's authority to create a federal common law is strictly limited to two situations: "those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' . . . and those in which Congress has given the courts the power to develop substantive law . . . ." *Texas Industries v. Radcliffe Materials,* 451 *U.S.* 630, 640 (1981), (citations omitted). Petitioner here urges that there are uniquely federal interests which warrant creation of a federal common law remedy for his injuries. However, he fails to recognize that the doctrine requires that a federal rule of decision must be *necessary* to protect the federal interest because of a significant conflict between the federal interest and the use of state law as the rule of decision. *Milwaukee v. Illinois, supra,* 451 *U.S.* at 313; *Bio/Basics International v. Ortho Pharmaceutical Corp.,* 545 *F. Supp.* 1106 (S.D. N.Y. 1982).

In this case, there is no conflict. The federal interest in issue is plainly Congress' interest in conducting thorough and probing investigations which requires a forum where its witnesses will be able to testify freely without the fear of being subjected to a private suit for defamation. *Yip v. Pagano, supra,* 606 *F. Supp.* at 1571. This "unique federal interest" could not possibly justify a finding by this Court that the privilege provided legislative witnesses in state law should be limited by this Court. To the contrary, absolute privilege *must* be afforded legislative wit-

nesses in order to protect the unique federal interest involved. State law fully protects the federal interest. In contrast, the unique federal interest would not be protected by the rule suggested by petitioner. Even where a federal interest as concrete as the status of the United States Government as a creditor is at stake, a federal court cannot find a rule of decision in the "general law" when Congress has not acted and where "there exists a flexible body of pertinent state law continuously being adapted to changing circumstances. . . ." *Commissioner v. Stern*, 357 *U.S.* 39, 45 (1958).

Petitioner's stated reasons for seeking the writ fail to address the real issue of whether a federal court should or could expand the remedy for defamation provided by New Jersey common law. Petitioner does not assert that the District Court improperly defined New Jersey law governing privilege of a witness in legislative proceedings. He appears to concede that § 590A of the Restatement (Second) of Torts correctly states New Jersey law. Rather, he implies that the District Court incorrectly applied state law or failed to create federal common law when it found that Colonel Pagano was a "witness in a legislative proceeding" and, instead, Colonel Pagano should have been characterized as an individual petitioning the government. In that status, Yip Hon appears to argue, Colonel Pagano would only have a qualified privilege to publish defamatory remarks under New Jersey or federal law citing *McDonald v. Smith, supra,* and *Burke v. Deiner, supra,* in support of his position.*

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* Petitioner has misconstrued the impact of *McDonald v. Smith, supra,* and *Burke v. Deiner, supra.* These cases do not expand

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New Jersey's Supreme Court has not had an occasion to address, or finally resolve, the issues presented. Nevertheless, as discussed above, Judge Cohen clearly found that § 590A of the *Restatement (Second) of Torts* properly defines the privilege of a witness in a legislative proceeding that would be applied under New Jersey law. He specifically found that New Jersey law would require that:

> in order to be absolutely privileged, a statement made to a legislative body must be (1) related to the subject matter (2) of legislative proceedings (3) which are either (a) being conducted or (b) being contemplated in good faith, and (4) which are within the jurisdiction of the legislative body conducting them. [*Yip v. Pagano, supra,* at 157].

Moreover, this privilege would not be pierced even if the witness had not been subpoenaed, did not testify under oath and did not make his statement in response to a specific question. *Id.* Then, applying the facts assumed to be true for purposes of summary judgment, Judge Cohen found that, under New Jersey law Colonel Pagano was a witness before a legislative body within the meaning of *Restatement (Second) of Torts,* § 590A; that he was more than a mere petitioner of the government.

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the remedy for defamation otherwise created by the State. Rather, they hold that a state cannot create a judicial remedy for defamation when to do so would interfere with an individual's right to petition the government. In other words, *McDonald* and *Burke* hold that the Constitution *protects* individuals from liability for defamatory statements made when petitioning the government; they do not hold that the individual defamed is entitled to a greater remedy than would otherwise be available under the state tort law.

The reasons presented by Yip Hon are not the type of "special and important reasons" for granting a writ contemplated by Rule 17 of the Supreme Court. Yip Hon has presented no reason for this Court to break with its tradition of denying a writ of certiorari when to grant the writ would result in a simple review a Court of Appeals' determination of state law. *Haring v. Prosise,* 462 *U.S.* 306, 314 n.8 (1983), quoting *Bishop v. Wood,* 426 *U.S.* 341, 346 (1976). The denial of the writ is particularly appropriate in instances such as this where the Court of Appeals has had to determine state law without the benefit of a decision on point from the highest court in the state. *Huddleston v. Dwyer,* 322 *U.S.* 232, 237 (1944). In this case, the District Court properly determined and applied state law from "all available data." The Court of Appeals, in its affirmance of the District Court, fulfilled its obligation to reach a reasonable construction of New Jersey law and apply it to the facts of this case.

The decision below was properly decided as a matter of state law and should not be reviewed here. Petitioner filed a diversity action claiming injury from defamation. The right to a remedy for injury to one's reputation is a state created right and its limits are likewise determined by state law. Petitioner has not asserted any injury to a federally protected right or postulated a uniquely federal interest which can only be protected by the adoption of a federal rule of decision. Review by this Court would simply be a review of the application of a state law decision to a particular set of facts. Such a matter is most certainly not a "special and important reason" for granting the writ as contemplated by Rule 17 of the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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